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In the Supreme Court of the United States

OCTOBER TERM 1993

ANDREW V. RESTIVO, II,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Confrontation Clause of the Sixth Amendment violated when a defendant is prohibited from going beyond the written particulars of a government-drafted plea agreement in cross-examining a witness concerning his motivations for, and expectations from, the plea agreement; and, in particular, is prohibited from exposing the witness' perception that his cooperation will cause the government not to prosecute his children for their involvement in his crimes; is prohibited from eliciting the witness' knowledge that, by his plea, he has reduced his sentencing exposure by tens of years; and is prohibited from exploring the witness' awareness that the government's sentencing assistance may be governed by its satisfaction with the substance of his testimony?

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued its opinion affirming petitioner's conviction on November 22, 1993. The Fifth Circuit's opinion is reported at 8 F.3d 274 (Appendix A). Panel rehearing and a suggestion for rehearing en banc were both denied on December 27, 1993, and this also is reported at 8 F.3d 274 (Appendix B).

JURISDICTION

Jurisdiction to review by certiorari the decision of a federal court of appeals

in a criminal case is established in Section 1254(a) of Title 28, United States Code.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him;....

SENTENCING GUIDELINES SECTION 5K1.1

Section 5K1.1 of the United States Sentencing Guidelines provides in pertinent part:

> §5K1.1. Substantial Assistance to Authorities
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.***

STATEMENT OF THE CASE

This case involves the cross-examination for bias of a government witness who had entered into a written plea agreement.

The Fifth Circuit held that a denial of cross-examination as to the expectations and motivations arising from the plea agreement causes no Confrontation Clause violation so long as the government informed the jury of the written particulars of the plea agreement. This holding brings the Fifth Circuit into direct conflict with other courts of appeals. It presents an evasion of this Court's command in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), that denials of confrontation for bias be recognized as constitutional error, subject only to harmless error review. As a consequence, it signals to the trial courts of the Fifth Circuit a trivialization of the defendant's constitutional right to confront the witnesses against him and thereby to expose the biasing motivations of the witness. Certiorari is appropriate to remedy this serious erosion of the right of confrontation and its truth-seeking function.

A. Course of proceedings and disposition below.

A grand jury in the Eastern District of Louisiana indicted petitioner Andrew V. Restivo, II for various offenses arising during and in connection with his tenure as president of the Schwegmann Bank & Trust Company, a New Orleans area bank. The charges included counts alleging conspiracy, bank fraud, misapplication by a bank officer, money laundering, false entries in bank documents, and false declarations before a grand jury investigating those offenses.

The jury convicted Restivo on 11 of the 12 counts charged. The district court sentenced him to a prison term of 100 months followed by three years supervised release.

B. Statement of the facts.

This case involved three principal actors: petitioner Restivo, and government witnesses Jerry Delchamps and Lloyd Hoffman. Restivo, in his mid-30's, was the president

of a small New Orleans area bank, the Schwegmann Bank & Trust Company. Jerry Delchamps ran Dixie Lloyds, a 10/20/10 automobile liability insurer, and related companies, one of which arranged premium financing at the Schwegmann Bank for low-income automobile owners. Delchamps was a borrower from, and maintained his insurance and premium finance company operating accounts at, the Schwegmann Bank. Lloyd Hoffman was Delchamps' loan officer at the Schwegmann Bank.

The banking and related crimes were of two sorts. First, Delchamps was the recipient of three large loans from the Schwegmann Bank which were not board-approved, although required to be so because each exceeded $250,000. Second, Delchamps kited funds between his accounts at the Schwegmann Bank and his accounts at another New Orleans area bank, the Bank of Louisiana; as a result of his bogus cross-deposits, the kited loss

between the two banks amounted to close to $2 million.

It was by corrupting Hoffman that Delchamps got Hoffman to help procure the board-unauthorized loans. Delchamps enticed Hoffman secretly to invest $6,000 in a Delchamps company, and obligated Hoffman further in the venture by a $150,000 note Hoffman signed in Delchamps' favor. Neither Restivo, nor the Schwegmann Bank Board, nor anyone else at the Schwegmann Bank knew of Hoffman's compromised and divided loyalties.

Delchamps was able to begin and continue the check kite between his accounts at the Schwegmann Bank and at the Bank of Louisiana by corrupting officers of the Bank of Louisiana. When these officers discovered that Delchamps was writing checks from his Bank of Louisiana accounts against insufficient funds, Delchamps bribed them with free insurance to permit him to continue the practice. Because of the uncertain-

ties of Delchamps' financial condition, Restivo instructed Schwegmann Bank officials to verify daily over the telephone with the Bank of Louisiana that there were sufficient funds at the Bank of Louisiana to cover Delchamps' deposits of Bank of Louisiana checks. The corrupt Bank of Louisiana officials falsely verified each day that the Bank of Louisiana checks were good. Delchamps did not share knowledge of his check kiting scheme with anyone at the Schwegmann Bank, not even his corrupted loan officer, Hoffman.

The government did not allege, and there was no evidence, that Delchamps paid off Restivo, or in any other way financially benefitted Restivo, in order to obtain the loans from the Schwegmann Bank without board approval or to permit the check kite to continue. The government's theory of benefit was that this young bank president wanted his young bank to prosper, and there-

fore he wanted a major customer, Delchamps, to stay afloat.

Restivo testified. He denied any knowing and intentional participation in Delchamps' obtaining loans that Restivo believed to be unauthorized,[1] and he denied any knowing or intentional assistance or allowance of the check kite.

The government's principal witnesses against Restivo were Delchamps and Hoffman. To convict Restivo on the allegations of wrongdoing involving the check kite, the jury had to believe Delchamps over Restivo. To convict Restivo on the allegations of wrongdoing involving the board-unauthorized loans, the jury had to believe Delchamps and Hoffman over Restivo.

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[1]There were three such loans. Restivo testified that he did not participate in arranging the first two loans at all, and believed that he had continuing authorization for the third loan which he did arrange.

C. The attempted cross-examination of Delchamps for bias.

Both Delchamps and Hoffman had pled guilty by the time of Restivo's trial. They did so under agreements to testify against Restivo in exchange for significantly reduced charges carrying greatly reduced maximum penalties. In both cases, the government confected written plea bargain letters. Delchamps' letter said he had pled to two five year counts, Hoffman's, that he had pled to one five year count. In these letters, the government noted the availability of a substantial assistance motion under Section 5K1.1 of the United States Sentencing Guidelines to enable the defendant to receive a sentence below guidelines, but asserted that no promise was made, and that the government retained unfettered discretion to make the motion or not.[2] The plea

[2]After Restivo's trial, the government filed Section 5K1.1 motions for both Delchamps and Hoffman thereby enabling an 18

letters also state that the defendant "agrees" that he will "be completely truthful," and they repeat several times the defendant's obligation, under his part of the bargain, to tell the truth.[3]

The government called Delchamps to the witness stand before Hoffman. As a trial stratagem, it fronted Delchamps' plea bargain during his direct examination, but elicited only limited information about the plea bargain.

The government had Delchamps admit the two count plea, but not that the plea bargain thereby limited his sentencing exposure to 10 years. Asked to state his understanding of the plea agreement, Delchamps testified that he was to tell the truth. He further stated his belief that if he told

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month sentence for Delchamps and probation for Hoffman.

[3]The Delchamps plea letter is reprinted in Appendix E.

the truth, the government "*would* write a letter for me... to the Judge and ask for a lighter sentence." The government let pass without comment or correction this apparent contradiction to the unfettered discretion purportedly reserved to the government in the plea letter, and asked Delchamps no questions about the Section 5K1.1 motion. The government thereafter introduced the plea letter. Delchamps stated that there were no other agreements and no promises.[4]

On cross-examination, defense counsel intended to confront Delchamps on unstated consequences of his plea bargain, on the meaning and impact of certain of the written terms of the government-drafted plea letter, and on certain of Delchamps' statements on the direct examination. The combination of

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[4]The government's direct examination of Delchamps on his plea bargain is reprinted in Appendix C; the cross-examination of Delchamps on the plea bargain is reprinted in Appendix D.

government objections and court rulings, however, defeated these objectives. By the conclusion of the cross-examination of Delchamps on his plea bargain, the jury had heard little more than what the government had already presented on its direct examination.

Defense counsel first attempted to explore the limits on sentencing exposure Delchamps had achieved by agreeing to testify against Restivo. The court, however, ***completely*** prohibited cross-examination on ***any*** aspect of sentencing, including sentencing exposure, i.e., the "cap" achieved by negotiating the plea to the two five-year counts. All the defense was permitted to elicit from Delchamps was that he knew that, but for the plea bargain, he could also have been charged with money laundering, but because of the prohibition on questions about sentence, the jury never learned the additional fact that alone gives consequence

to the disclosure: that a single count of money laundering carries the potential for an additional 20 year sentence.[5]

Defense counsel next turned to Delchamps' Section 5K1.1 expectations. The court again permitted the government's version from its direct examination to go to the jury untested by meaningful cross-examination. To the suggestion that he would get the coveted Section 5K1.1 letter only if the government thought he *earned* it, Delchamps reiterated his statement on direct, that he *would* get it if he told the truth. When defense counsel pressed Delchamps to concede that the government would at least have to buy his testimony *as* the truth, the government objected that cross-examination on the

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[5]The government conceded in its brief in the Fifth Circuit that Restivo had the right to cross-examine Delchamps on his potential sentence, and that the government's objection -- which provoked the court's denial of cross-examination on the subject -- was erroneous.

subject should be limited to the plea bargain letter itself. Immediately thereafter, the court intervened, led Delchamps to agree that the plea letter was his understanding of the agreement, and cut off all further cross-examination on how Delchamps might be motivated or biased by his understanding of and his desire for the motion for sentencing departure.[6]

In the last effort to reveal Delchamps' motivation to help the government convict Restivo, defense counsel turned to benefits Delchamps might expect or hope from the government that were *not* expressed in the plea letter. Cross-examination on a plea agreement perforce means not only testing the assertions of the witness about it but also questioning both what was included and what was excluded. Delchamps testified on

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[6] THE COURT: And that document is in evidence. The jury can review it.

his direct examination by the government that there were no other promises or agreements besides the plea letter; he did not testify that he was without hope or expectation of additional benefits.

Counsel began this cross-examination by getting Delchamps to acknowledge that his daughter and son-in-law worked for Dixie Lloyds, wrote many of its checks, and were integrally involved in overpayments that caused cash flow problems, and, he was about to admit, had purchased their home with insurance company funds. Counsel intended to show that Delchamps could reasonably have believed that his daughter and son-in-law were vulnerable to prosecution, and that by pleading guilty and agreeing to testify against Restivo, he was protecting them from prosecution. As counsel pointed out to the court:

> [t]hey had an interest and participated... [T]hey did as much as anybody did. They're not

> charged. They're not named as targets or subjects.

The government argued that there was no such promise in the written plea letter it had drafted,[7] and that the cross-examination went "beyond the scope" of the government's "direct examination." The court accepted the government's arguments that the cross-examination was bound to the government-drafted plea letter, and shut the cross-examination down. "Stay off this." The case went to the jury without Delchamps ever having been confronted with this motive to lie or exaggerate, a motive from which the jury could have understood that he had powerful reason to give the government what he believed the government wanted in order

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[7]It is not in the plea agreement. Show me the plea agreement where it says I will not charge his daughter or son-in-law. Show me where it says that.

to protect his family from the possibility of prosecution.[8]

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's decision in this case conflicts with decisions in the Eighth, Ninth and Eleventh Circuits.

1. The Fifth Circuit's conflict with the Eleventh Circuit.

The Fifth Circuit did not dispute that Restivo was prevented from cross-examining Delchamps on "(3) whether Delchamps pled guilty to spare his daughter and son-in-law

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[8]Hoffman also made a plea bargain and signed a government-drafted plea letter similar to Delchamps'. But unlike Delchamps, Hoffman was shown to be biased from sources besides the plea bargain. Restivo had fired him from the bank, and Hoffman resented it; his animus towards Restivo is patent even on the cold record. Moreover, after Restivo fired him, Hoffman went to work for Delchamps and a jury might thereby have inferred a testimonial alliance between the two government witnesses. Because of the government objections and court rulings during the just completed cross-examination of Delchamps, however, Restivo's counsel chose not engage in the apparently futile exercise of cross-examining Hoffman on his plea bargain and thereby not repeat the debacle of the Delchamps cross-examination.

from prosecution." 8 F.3d at 278. Instead, the court listed other facts the jury learned about Delchamps from which the jury could draw inferences of his bias to give favorable testimony for the government. "Restivo's counsel,"[9] said the court, "was permitted to expose" these facts:

> that Delchamps entered into a plea agreement with the government; that Delchamps could have been charged with the more serious offense of money laundering if not for his plea agreement;[10] and that the issuance of the Section 5K1.1 letter for sentencing

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[9]This is a mischaracterization of the record. It was the government on its direct examination, not Restivo's counsel in exercising the right to confront and cross-examine, that "exposed" the most significant of the listed facts to the jury. See the footnotes immediately following.

[10]In fact, the jury never learned that money laundering was a "more serious offense" because the court prohibited questions on the higher sentence for and seriousness of that offense.

> purposes was within the discretion of the government.[11]
>
> *Id.*

The court concluded that there was no Sixth Amendment violation because, "[b]ased on ***these facts***, the jury could have inferred that Delchamps was a biased witness." *Id.*

The three listed facts, however, were all facets of but one source of bias that might motivate a witness to give falsely helpful testimony for the government. That source of bias was the self-interest of the witness in minimizing his time in jail. Delchamps wanted the lowest sentence he could get, and he both wanted and needed the government's help to get it.

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[11]The government, not Restivo's counsel, introduced the plea bargain letter that said that the Section 5K1.1 letter was within the sole discretion of the government. Delchamps contradicted this "fact," stating twice that he ***would*** get the Section 5K1.1 letter if he told the truth. The jury never learned, however, what "truth" Delchamps was speaking about.

But there was a second distinct source of bias, one not involving Delchamps' self-interest in achieving the lowest possible sentence. Delchamps could reasonably have believed that his daughter and son-in-law were vulnerable to prosecution for their roles in suspect aspects of his insurance business. He would want to protect them, if he could, from prosecution. And he could reasonably expect that, if he played on the government's side and helped the government in its effort to win, the government would not go after his family. Under these circumstances, it was appropriate to pose the question, "Would a father lie to keep his daughter out of the penitentiary?" The jury never learned the facts which would have forced it to confront this question and only then judge whether Delchamps might be falsely implicating Restivo in his own misdeeds in order to save his daughter and her husband from prison.

In overruling Restivo's claim under the Confrontation Clause, the Fifth Circuit somehow conceptualized bias as a uniform state which, once demonstrated in *any* way from *any* source, requires no further proof, no matter how compelling another source of bias might be. The court rejected the proposition argued, that the Sixth Amendment was violated because the witness' very distinct and independently powerful motivation to lie or exaggerate against Restivo was kept from the jury.[12]

The Eleventh Circuit has ruled to the contrary. *United States v. Lankford*, 955 F.2d 1545 (11th Cir. 1992), holds that,

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[14]Compare what Justice Jackson observed for a unanimous Court in *Gordon v. United States*, 344 U.S. 414, 423 (1953), about a judge's latitude to reasonably control cross-examination:

> But this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.

under the Confrontation Clause, the defendant is entitled to expose facts, brought out in cross-examination, that support each of several distinct sources of possible bias or motivation to fabricate in the government's favor.

In *Lankford*, the principal government witness was impeached by proof that he had demanded use immunity before he would testify for the government. *Id.* at 1549, n.9. The jury thereby learned that the witness had benefitted personally by agreeing to testify for the government; he had one source of bias: self-interest in avoiding a possible indictment based on admissions of criminal wrongdoing. In a totally unrelated incident, the witness' sons had been arrested on state charges for the sale of 20 pounds of marijuana. There had been no explicit deal for the sons with the federal authorities. When defense counsel attempted to prove the sons' arrest and how that might

have motivated the witness to want to help the government, the trial court refused to permit the impeachment. The Eleventh Circuit reversed, holding that the fact of the sons' state prosecution could not be kept from the jury under the Sixth Amendment:

> Notwithstanding the fact that LeCroy [the prosecution witness] had made no deal with the government concerning a federal investigation into his sons' marijuana arrests, his desire to cooperate may have in fact been motivated by an effort to prevent such an investigation. ***We cannot imagine a much stronger motive for testifying on behalf of the government than the desire to protect one's children.*** A reasonable juror could have concluded that LeCroy's testimony was the result of his desire to protect his sons and to obtain federal assistance in avoiding a subsequent federal prosecution against them. In addition, a reasonable juror could conclude that LeCroy might even have hoped that should things go "well" for the government in the Lankford case, he could later solicit help from the federal government in his sons' state case.
>
> *Id.* at 1549 (emphasis supplied).

Lankford therefore holds that personal benefits to a government witness involving his freedom on the one hand and protection of the witness' family from criminal penalties on the other are distinct biasing motivations for Sixth Amendment purposes. The Confrontation Clause of the Sixth Amendment was violated because this distinct and independently powerful motivation to lie or exaggerate against the defendant was kept from the jury.[13]

The Fifth Circuit and Eleventh Circuit cases are in direct conflict. The question -- impeachment of a government witness who receives personal benefits but who may also

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[13]Restivo's case was much more compelling on this score than was Lankford's. Delchamps' children were more directly vulnerable to a federal prosecution than were the witness' sons in *Lankford*. The source of vulnerability in Restivo's case arose out of the very same conduct that resulted in Delchamps' plea and testimony. And the prosecutor responsible for Delchamps' indictment directly controlled the fate of Delchamps' children.

have an equally strong or stronger motivation to protect family from prosecution -- is likely to recur. It involves a "prototypical form of bias on the part of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). It is, indeed, a special case of the broader question: whether allowance of impeachment for one prototypical form of bias makes immaterial under the Confrontation Clause proof of a second prototypical form of bias, distinct from the first, and independently motivating.[14]

2. The Fifth Circuit's conflict with the Eighth Circuit.

The Fifth Circuit acknowledged that Restivo was prevented from cross-examining Delchamps on "(1) whether a 'cap' existed on Delchamps' sentence as a result of his plea agreement." 8 F.3d at 278. It is undisput-

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[14]Petitioner notes that he cited and relied on *Lankford* in his original brief to the Fifth Circuit, yet the court failed even to mention *Lankford* in its opinion.

ed that the plea bargain created an absolute cap of 10 years on any sentence Delchamps could receive. But in fact, the limitation on cross-examination was broader than that. The government successfully objected that sentencing was "not [a] proper topic for the jury," thus preventing all exploration of Delchamps' received and hoped for benefits for testifying helpfully against Restivo. The Fifth Circuit, in upholding this ruling, therefore held that the specific sentencing goals the accomplice witness had achieved and still hoped to achieve by his plea bargain and testimony could be kept from the jury. The jury's knowledge of the mere existence of a plea agreement to lesser charges and of the discretionary Section 5K1.1 letter were all the biasing facts the Confrontation Clause required.

This decision cannot sit side by side with the Eighth Circuit's decision in *United States v. Roan Eagle*, 867 F.2d 436 (8th

Cir.), *cert. denied sub nom. Roan Eagle v. United States*, 490 U.S. 1028 (1989). In that murder prosecution, the government witness was a former co-defendant who had been given a plea bargain to manslaughter, thereby reducing her sentencing exposure from life in prison to 10 years. The jury learned that the witness pled to a lesser charge, but not what that plea meant for her hopes for freedom. The trial court prohibited cross-examination of the witness that would have exposed this strongly biasing motivation, but the Eighth Circuit ruled that this foreclosure violated the defendant's Sixth Amendment right to confrontation.

> When the stakes are so high and the credibility of the one-time associate-in-crime is acutely involved, the accused is entitled as a matter of right to effective cross-examination. This includes not only the specific crime to which the co-actor is pleading guilty, but the range of punishment to which the one pleading guilty is exposed to in contrast

> to what that person knows -- or ought to know -- is the potential sentence for a conviction following a plea of not guilty.
>
> * * *
>
> To save herself from years up to life, she could plead guilty and assure a maximum of ten years. What greater inducement or incentive could there be for one confronted with that prospect to eliminate all doubts and risks by a plea of guilty to a known lesser offense so that such person could carry out the plea agreement to testify affirmatively against the former co-defendant.

Id. at 443.[15]

Thus, the Fifth and Eighth Circuits are at loggerheads over the meaning of the right to confront and cross-examine for bias an alleged "one-time associate-in-crime" who becomes a government witness and saves or hopes to save years behind bars if he does the government's bidding. In the Eighth

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[15]It turned out that the plea-bargained government witness in *Roan Eagle* did not give any harmful testimony. Thus, the credibility of the witness was not in issue and the court affirmed the conviction.

Circuit, such a witness as of right "would be subject to the most vigorous attack on credibility" based on the sentence received for testifying for the government. *Id.* at 443. In the Fifth Circuit, if from any facts "the jury could have inferred that [the witness] was a biased witness," 8 F.3d at 278, no cross-examination, let alone vigorous cross-examination, need be afforded on the years of freedom achieved or anticipated. The difference in the credibility testing process required in these two circuits, both operating under the command of the same Sixth Amendment, could not be starker.

3. The Fifth Circuit's conflict with the Ninth Circuit.

The written plea bargain stated:

- The defendant understands that he must be completely ***truthful***.
- The defendant also agrees to appear before the Grand Jury or trial Jury and to testify ***truthfully***.

> - The defendant agrees that if he is not *truthful*, this agreement will be null and void and the defendant may be prosecuted for perjury or making false statements.[16]

The Fifth Circuit acknowledged that Restivo was prevented from cross-examining Delchamps on "(2) whether the government had to agree that Delchamps was telling the truth before it filed a substantial assistance letter on his behalf." 8 F.3d at 278. On direct examination, Delchamps testified that he would get the Section 5K1.1 letter if he told the truth, but that he would violate the plea agreement "[i]f I would lie and wouldn't tell the truth."

When Restivo's counsel, on cross-examination, attempted to probe Delchamps' belief of what "telling the truth" in connection with his plea bargain meant to him -- was it

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[16]The plea letter also stated, "The defendant agrees neither to implicate anyone falsely nor to exculpate or protect anyone falsely."

the government buying and accepting his story implicating Restivo, one that he had already successfully sold? -- the district court shut down the examination by referring the jury to the plea bargain letter.

> THE COURT: Is your understanding of the plea agreement what was represented by the document that you signed?
>
> THE WITNESS: Yes, ma'am.
>
> THE COURT: And that document is in evidence. The jury can review it.

For all intents and purposes, then, the district court ruled that the plea bargain letter was the best evidence of Delchamps' beliefs and motivations about his deal. The witness' conception of the "truth" in his plea agreement and who would judge it and how and in what way that might affect his testimony could be kept from the jury; the meaning of truth for Delchamps was besides the constitutional point of the Sixth Amendment. The jury's knowledge of simply the

existence of a plea agreement to lesser charges and of the discretionary Section 5K1.1 letter were all the biasing facts the Confrontation Clause required.

In *United States v. Mayans*, ___ F.3d ___, 1994 U.S. App. LEXIS 2013 (No. 92-50530)(9th Cir. 2/9/94), three alleged buyers of drugs from the defendant testified against him. Their written plea bargains were presented to the jury and the jury could therefore read the written terms of the agreements. The Ninth Circuit opinion does not detail the plea bargains, but presumably the witnesses pled guilty to lesser or fewer charges and were subject to and motivated by the government's power to give or withhold the Section 5K1.1 letter (or the parallel, post-sentence Rule 35 (b) motion). When defense counsel attempted to probe the witnesses' understanding of specific provisions of their plea agreements, however, the trial court cut off question-

ing, essentially holding the plea agreements, rather than what was inside and motivating the witnesses' minds, to be the best evidence of the witnesses' understanding of the agreements. The Ninth Circuit reversed.

> But the understanding of all three of the witnesses clearly was relevant, and the district court erred by cutting off defense counsel's cross-examination on the grounds that it was not.

The Fifth and Ninth Circuit decisions conflict. In the Fifth Circuit, disclosing the fact of a plea bargain, the fact that the plea was to lesser charges, and the fact that the government has discretion to file a Section 5K1.1 letter or not, is all the confrontation to which the Sixth Amendment entitles a defendant. In the Ninth Circuit, the written plea agreement is the starting point of the cross-examination, not its end point. What is relevant in the Ninth Circuit is what the witness understands (be-

lieves, hopes),[17] not simply and only what the government has written up to be viewed by the jury.[18]

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[17]*Cf. Gordon v. United States*, 344 U.S. 414, 422 (1953).

> But the question for the jury is ***what effect they think these words had on the mind and conduct of a prisoner whose plea of guilty put him in large measure in the hands of the speaker.*** They might have regarded it as an incentive to involve others, and to supply a motive to [the witness'] testimony other than a duty to recount the facts as best he could remember them.

[18]The Fifth Circuit is also in apparent conflict with the First Circuit. In *United States v. Lynn*, 856 F.2d 430 (1st Cir. 1988), the government-drafted plea bargain included a clause requiring the witness to pass a polygraph examination. However, defense counsel was barred from cross-examining the witness on some "inconclusive" responses in the polygraph examination. The written plea agreement went to the jury. The First Circuit reversed because defense counsel was not permitted to test the witness on this part of his written plea bargain.

> This particular area of Bryon's potential bias had not yet been fully explored by the defense. While the cross-examination of Bryon was extensive, there were

4. Summary of the conflicts.

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), this Court instructed courts considering a claimed Confrontation Clause violation to focus on the witness, and then determine if "cross-examination designed to show a prototypical form of bias" of the witness had been foreclosed at trial, thereby preventing a reasonable jury from receiving "a significantly different impression of [the witness'] credibility." *Id.* at 680. The motivation to protect family from prosecution by testifying favorably for the

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relatively few questions concerning Byron's continuing reasons to lie to please the government. Defense counsel elicited the details of Bryon's many drug smuggling operations and of his dealings with his associates in crime, but cross-examination on the foreclosed topic may have presented the only concrete example ***of the hold the government might still have had over the witness.***

Id. at 433.

prosecution is a prototypical form of bias; so is saving oneself years in jail; and so is what you feel and believe you have to say to get the government to help you and prevent the government from hurting you. Cross-examination on these prototypical forms of bias was foreclosed by the district court, but the Fifth Circuit chose not to follow *Van Arsdall's* instructions. The Fifth Circuit thereby created conflicts with the Eighth, Ninth and Eleventh Circuits, all of which heeded *Van Arsdall's* instructions, conflicts which the Court should resolve by granting certiorari.

B. The Fifth Circuit's decision flouts this Court's instructions, as set forth in *Delaware v. Van Arsdall*, on how to evaluate Confrontation Clause claims where cross-examination for bias has been curtailed.

In *Delaware v. Van Arsdall*, *supra*, the witness to the homicide was impeached by proof that he had been very drunk. The trial court refused to permit further im-

peachment of the witness on the separate fact that a minor public drunkenness charge had been dropped after he agreed to speak with the prosecutor. The Court found a violation of the Confrontation Clause because the defendant had been denied even the opportunity for cross-examining the witness on this separate issue potentially affecting his credibility:

> [T]he trial court prohibited *all* inquiry into the possibility that Fleetwood would be biased as a result of the State's dismissal of his pending public drunkenness charge. By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause.
>
> *Id.* at 679 (emphasis as in original).

Here, the trial court limited cross-examination to the government-drafted plea letter and prohibited *all* inquiry into the possi-

bility that Delchamps was biased from a motivation to protect his daughter and son-in-law from the possibility of prosecution.[19] As in *Van Arsdall*, the fact that

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[19]Government counsel never once contradicted defense counsel's assertions about the children.

> They had an interest and participated... [T]hey did as much as anybody did. They're not charged. They're not named as targets or subjects.

And the preliminary questions of defense counsel revealing the involvement of Delchamps' children in questionable aspects of his insurance business gave more than ample reason to believe that the cross-examination would be successful -- whether Delchamps admitted that he was so motivated or not. But there is no requirement that the cross-examiner be able to demonstrate in advance that he will succeed.

> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.
>
> *Alford v. United States*, 282 U.S. 687, 692 (1931).

the jury learned of other impeaching facts could not justify a total bar of the opportunity for cross-examination on this distinct source of potential bias.

Under *Van Arsdall*, the Fifth Circuit was required to determine whether "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination." *Id.* at 680. That is because the Confrontation Clause demands the opportunity for effective confrontation of ***the witness.***

> [T]he focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial.
>
> *Id.* at 680.

The Fifth Circuit should therefore have focused on Delchamps to judge whether or not

the jury, hearing that Delchamps might believe he was protecting his family by testifying for the government, could get a significantly different impression of him than it got from his distinct and self-centered interest in keeping his sentence low.

The potentially biasing fact in *Van Arsdall* was the prosecutor's dismissal of a minor public drunkenness charge. The Court concluded that if the jury had known of this fact, its impression of the witness would have been significantly different. Restivo's case that the Confrontation Clause was violated is inherently more persuasive. The powerful motive to lie to protect a child from a felony prosecution can hardly be compared to the temptation to lie to get out of a misdemeanor charge of public drunk-

enness.[20] If the Fifth Circuit had abided by *Van Arsdall's* rules, it could not have avoided finding a violation of the Confrontation Clause.

The Fifth Circuit violated *Van Arsdall's* rules, and it did so flagrantly. It itemized the foreclosed lines of cross-examination. But it refused to determine if any one of those lines (or all of them together) could have given the jury a significantly different view of Delchamps' credibility. It made no judgment on whether the district court had erroneously prohibit-

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[20] *See also Davis v. Alaska*, 415 U.S. 308 (1974). There, the state's witness admitted that it "came across [his] mind" that "the police might somehow think that [he] had something to do with" the burglary, *id.* at 313, a demonstration of some potential for bias. But that did not satisfy the Sixth Amendment's demand that the jury *also* know that the witness was on juvenile probation for burglary, because from that fact, the jury could have inferred more concretely that the witness felt vulnerable to police pressure and that he might be considered a suspect if he did not lay off suspicion on someone else. *Id.* at 318.

ed proper questions. It gave no guida to district courts in the Fifth Circuit on what cross-examination the Confrontation Clause requires. Instead it jumped to other facts. From these other facts, it said, the jury might have inferred that Delchamps was a biased witness. It concluded that there was no Sixth Amendment violation without ever having decided whether Restivo was "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Van Arsdall*, 475 U.S. at 680.

What the Fifth Circuit did is precisely what *Van Arsdall* prohibits. The Fifth Circuit engaged in a kind of outcome-determinative analysis for Confrontation Clause claims that the Court explicitly rejected.[21] Without judging whether there had been a denial of confrontation, it concluded

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[21]See 475 U.S. at 679-80; 684-86 (concurring opinion of Justice White).

that there could be no error because "the jury could have inferred that Delchamps was a biased witness." 8 F.3d at 278. By doing so, it not only avoided honoring Confrontation Clause values. By failing to acknowledge that proper lines of cross-examination were foreclosed, it avoided even the fair and diligent scrutiny that constitutional harmless error analysis demands.[22]

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[22]If the Fifth Circuit had conducted a fair and diligent analysis for harmless error, it would have had to acknowledge Delchamps' importance to the government's case. On the check kite and money laundering counts, it was only Delchamps' word that Restivo had to know laid against Restivo's denials. Delchamps testified that he never told Restivo explicitly that he was kiting checks. There simply was no direct evidence of Restivo's knowledge and intent. Absent Delchamps' testimony, none of the government's purported corroborating evidence was sufficient to support a conviction.

On the counts involving the loans, Delchamps was aligned with Hoffman against Restivo. However, there was little else to corroborate their word that Restivo had knowingly and intentionally participated in issuing loans that he believed required board approval. If Delchamps had been successfully impeached and discredited, the jury would have had to choose, one on one, between

Van Arsdall imposed a regime of honesty in analyzing allegations that proper cross-examination was foreclosed. And for good reason. The Confrontation Clause promotes accuracy in fact finding. Violations of the Confrontation Clause should therefore be discouraged because they lead to inaccuracy in fact finding. Such violations should not

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Restivo and Hoffman. At trial, Hoffman displayed an animus towards Restivo deriving from Restivo's firing him, thus revealing his bias against Restivo. But for the improper decimation of the cross-examination on Delchamps' plea bargain, there would have been a substantial basis for attacking Hoffman on *his* plea bargain. Indeed, as a result of the deficient, counter-productive cross-examination of Delchamps, Hoffman's credibility as a plea-bargained witness was bolstered. Even without such an impeachment, on Count 4, where Hoffman and Delchamps testified that Restivo was party to one of the three loans but where the documents did not support Restivo's involvement, the jury acquitted.

Thus, if Delchamps had been successfully impeached, the outcome of the trial might well have been different. On a fair and diligent analysis for harmless error, a court would have had major difficulty finding the denial of confrontation harmless beyond a reasonable doubt.

occur in the first place and, subject to harmless error analysis which serves other interests, such violations should be identified forthrightly when they occur and disapproved so that lower courts will be deterred from repeating the errors.[23]

Decisions, like the Fifth Circuit's in petitioner's case, erode these constitution-

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[23]If --

> [n]ormally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses[,]
>
> *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987);

and if the right to confrontation is --

> designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination,
>
> *id.*

then wide latitude is to be encouraged by the appellate courts and improper restrictions on cross-examination should be disapproved.

al values. By failing to acknowledge proper cross-examination that has been foreclosed, the court of appeals sends the wrong signal to district courts under the court's tutelage. Government-drafted plea bargains and Section 5K1.1 inducements are daily grist for cross-examination in criminal trials in every federal district court. It is wrong, by opinions such as this, to encourage district courts to tell juries to accept the government's version of the plea agreement and to tell counsel to move on from there. By disregarding *Van Arsdall*'s injunctions, the Fifth Circuit has disserved the Confrontation Clause.

The Court should grant certiorari to preserve, invigorate, and enforce the principles on which *Van Arsdall* is based.

C. The Fifth Circuit overrode the core value of the Sixth Amendment: confrontation *by the defendant*.

The Fifth Circuit concluded that there was enough information from which "the jury could have inferred that Delchamps was a biased witness." It based its conclusion on the following facts:

> [a] that Delchamps entered into a plea agreement with the government; [b] that Delchamps could have been charged with the more serious offense of money laundering if not for his plea agreement; and [c] that the issuance of the §5K1.1 letter for sentencing purposes was within the discretion of the government.

The court then states that "Restivo's counsel was permitted to expose" these facts to the jury.

Except for one aspect of [b], however, these facts were *not* "exposed" to the jury *on cross-examination* by Restivo's counsel; they were elicited by the government. It was the government *on its direct examination* that introduced to the jury the plea bargain

and the government's formulation of how Delchamps could get the Section 5K1.1 letter.[24]

It is surely apparent that the government did not intend that, upon its eliciting these facts, the jury would find Delchamps biased, turn away from him and discount his testimony. To the contrary, the government brought out these facts in order to advance its case; to preempt and blunt defendant's attack on Delchamps' credibility; and to minimize any alleged biasing impact of the plea bargain.

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[24]As to the second of the facts, [b], it is true that it was Restivo's counsel who exposed for the first time on cross-examination Delchamps' knowledge that he could have been charged with money laundering if not for his plea agreement. But it is not true that the jury learned, from the defense or from anyone, that money laundering was a "more serious" charge, because the court barred Restivo's counsel from exposing anything about sentences and sentence exposure. The money laundering information came to the jury devoid of its significance for Delchamps' sentencing prospects.

On cross-examination, however, the court barred Restivo's counsel from probing these matters significantly beyond the terms of the government-drafted plea letter. Instead of hearing what the plea bargain truly meant to someone motivated to stay in the government's good graces; instead of learning about the power of that arrangement to tempt a witness to exaggerate or lie; instead of understanding that the witness might have hopes and expectations to protect his family, although not promised in the plea letter; the jury learned nothing but the trivialization of the distorting effect of the plea bargain that the government wanted it to hear.

The Sixth Amendment is a *defendant's* right. "In all criminal prosecutions, *the accused* shall enjoy the right... to be confronted with the witnesses against him." The defendant's right under the Sixth Amendment is an adversarial right that serves an

adversarial value and it cannot be satisfied by *the government's* elicitation of facts any more than *ex parte* affidavits or depositions could satisfy that core Sixth Amendment value. *Mattox v. United States*, 156 U.S. 237, 243 (1895). Without seeing and hearing a witness react to the challenge of the cross-examiner, there is no confrontation, there is no "testing... and sifting of the conscience of the witness." *Id.*

The government cannot be trusted to confront its own witnesses. Adversarial "cross-examination... is critical for ensuring the integrity of the fact-finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). That was a decision made by the framers of the Constitution. The Fifth Circuit's decision cannot stand side by side with the Constitution.

Certiorari should be granted to reinstate in the courts of the Fifth Circuit the principle that the government's introduction

of the plea bargain it drafted and entered into with its witness is not confrontation under the Sixth Amendment.

CONCLUSION

The Fifth Circuit has not abided by this Court's rules for analyzing claimed violations of the Confrontation Clause. As a consequence, it will not acknowledge when district courts within its purview unconstitutionally foreclose cross-examination on prototypical forms of bias, and so will not encourage its district courts to correct their erroneous views. Its opinion instead encourages them to persist in denying confrontation rights. As a further consequence, the Fifth Circuit has created conflicts with other circuits that honestly scrutinize violations of the Confrontation Clause in accordance with this Court's rules. The Fifth Circuit has also confused the government's presentation of facts that might be perceived as biasing with the

defendant's right to confront the government's version of those facts and cross-examine on their potential for distorting a witness' testimony.

Certiorari should be granted to enforce this Court's rules in Confrontation Clause cases, to resolve the conflicts among the circuits that the Fifth Circuit's violation of the rules has occasioned, and to certify that confrontation is a defendant's right that is not satisfied by the government presenting its version of a plea bargain's implications. The Court should then declare that petitioner's confrontation rights were violated. It may then remand for harmless error analysis or, instead, make the judgment itself that the confrontation violations were not harmless beyond a reasonable doubt. See *Olden v. Kentucky*, 488 U.S. 227 (1988).

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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM 1993

ANDREW V. RESTIVO, II,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NO. 92-9585

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

ANDREW V. RESTIVO, II,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

(November 22, 1993)

Before POLITZ, Chief Judge, REAVLEY, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Andrew Restivo appeals his convictions on eleven counts of a twelve count indictment charging him with the following offenses: conspiracy to misapply bank funds and to make false entries in bank documents; executing a scheme to defraud a bank; will-

ful misapplication of bank funds; money laundering; knowingly causing to be made false entries in bank documents; and perjury before a grand jury. Finding no reversible error, we affirm.

I

During his tenure as president of Schwegmann Bank (the "Bank"), Restivo developed an insurance premium finance ("IPF") department which provided consumer financing for automobile insurance premiums. Lloyd Hoffman, a vice-president and loan officer at the Bank, brought in Jerry Delchamps as a new Bank customer. Delchamps was president of Dixie Lloyds Insurance Company ("Dixie Lloyds"), an automobile liability insurer. To conduct the financial transactions of Dixie Lloyds's, Delchamps opened and maintained checking accounts at the Bank.

In September 1989, Delchamps approached *Restivo and Hoffman for a $1.6 million* loan.[1] Restivo and Hoffman presented on Dixie Lloyds's behalf two loans packages to the Bank's Board of Directors. The Bank eventually approved a loan to Dixie Lloyds in the amount of $500,000.00.

The September loan did not solve Dixie Lloyds's problems. By February 1990, Delchamps's accounts with the Bank were overdrawn in the amount of $345,000.00. With Restivo's alleged approval, Delchamps executed a promissory note to the Bank in the amount of $500,000.00. The Bank's Board of Directors had no knowledge of this loan.[2]

---

[1]An audit by the Louisiana Insurance Commissioner revealed that Dixie Lloyds had a statutory deficit of $2.4 million, and was therefore in danger of being closed. The Insurance Commission listed as one remedial measure the payment of $1.6 million of the $2.4 million deficit.

[2]This loan was charged as a misapplication by a bank officer in Count 4.

By April 1990, Delchamps's accounts were again overdrawn. Knowing that the Bank was due to be reexamined by the Federal Deposit Insurance Corporation (the "FDIC"), Restivo wanted the February loan off the books and the overdrafts paid. On April 11, Delchamps executed another promissory note in the amount of $500,000.00, which Restivo initialled.[3] Two days later on April 13, Delchamps executed another promissory note in the amount of $485,328.96, which Restivo also initialled.[4] The Bank had no knowledge of these loans.

Restivo was subsequently charged in a twelve-count indictment with: conspiracy to misapply bank funds and make false entries in bank documents, in violation of 18 U.S.C.

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[3]This loan was charged as a misapplication of bank funds in Count 5. The use of the loan's proceeds to pay the February loan was charged as money laundering in Count 7.

[4]This loan was charged as a misapplication by a bank officer in Count 6.

§ 371 (1988) (Count 1); executing a scheme to defraud a bank, in violation of 18 U.S.C. §§ 1344, 2 (1988) (Counts 2-3);[5] willful misapplication by a bank officer, in violation of 18 U.S.C. §§ 656, 2 (1988) (Counts 4-6); money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 2 (1988) (Counts 7-9); knowingly making false entries in bank documents, in violation of 18 U.S.C. § 1005 (1988) (Count 10); and perjury before a grand jury, in violation of 18 U.S.C. § 1623(a) (1988) (Counts 11-12). Restivo was convicted on eleven of the twelve counts of the indictment.[6] He was sentenced to a

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[5]Delchamps operated a check-kiting scheme, whereby cross deposits were made in the Bank and the Bank of Louisiana making it appear that there were substantial deposits in both banks. Restivo's knowing participation in the check-kiting scheme was charged as bank fraud in Count 3. The use of the scheme's proceeds to pay the April 13 loan was charged as money laundering in Counts 8 and 9.

[6]The jury returned a verdict of not guilty on Count 4.

prison term of 100 months, followed by three years supervised of release.

On appeal, Restivo contends that: (a) the district court denied his counsel the opportunity to effectively cross-examine Delchamps, a key government witness; (b) the district court's jury instruction regarding the money laundering counts constructively amended the indictment; and (c) the evidence was insufficient to support his convictions on Counts 3, 7, 8, and 9 of the indictment.

II

A

Restivo first contends that the district court denied his counsel the opportunity to effectively cross-examine Delchamps, by limiting cross-examination on the following subjects: (1) whether a "cap" existed on Delchamp's sentence as a result of his plea agreement; (2) whether the government had to agree that Delchamps was telling the truth before it filed a substantial assis-

tance letter on his behalf;[7] and (3) whether Delchamps pled guilty to spare his daughter and son-in-law from prosecution. "While the scope of cross-examination is within the discretion of the trial judge, this discretionary authority comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment."[8] The Confrontation Clause of the Sixth Amendment is satisfied where defense counsel has been "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the

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[7] *See* United States Sentencing Commission, *Guidelines Manual*, § 5K1.1 (Nov. 1992).

[8] *United States v. Elliott*, 571 F.2d 880, 908 (5th Cir.) (attribution omitted), *cert. denied*, 439 U.S. 953, 99 S. Ct. 349, 58 L. Ed. 2d 344 (1978).

witness."[9] To demonstrate an abuse of discretion, Restivo must show that the limitations imposed upon his counsel's cross-examination were clearly prejudicial.[10]

Notwithstanding the district court's restrictions on cross-examination, the record demonstrates that Restivo's counsel was permitted to expose to the jury the following: that Delchamps entered into a plea agreement with the government; that Delchamps could have been charged with the more serious offense of money laundering if not for his plea agreement; and that the issuance of the § 5K1.1 letter for sentencing purposes was within the discretion of the government. Based upon these facts, the

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[9]*Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 (1974); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S. Ct. 1431, 1436, 89 L. Ed. 2d 674 (1986) (citing *Davis*).

[10]*See Elliott*, 571 F.2d at 909 (quoting *Gordon v. United States*, 438 F.2d 858, 865 (5th Cir.), *cert. denied*, 404 U.S. 828, 92 S. Ct. 139, 30 L. Ed. 2d 56 (1971)).

jury could have inferred that Delchamps was a biased witness.[11] We therefore hold that the district court's restrictions on cross-examination neither violated the dictates of the Sixth Amendment, nor were so prejudicial as to constitute an abuse of discretion.[12]

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[11]We further note that while instructing the jury, the district court apprised the jury that "the government called as two of its witnesses Jerry Delchamps and Lloyd Hoffman, with whom the government has entered into plea agreements providing for the dismissal of some charges and lesser sentences than they would otherwise be exposed to or for the offenses to which they pled guilty."

[12]*See United States v. Vasilios*, 598 F.2d 387, 390 (5th Cir.) (holding that defendant was not prejudiced by the restrictions placed on his counsel's cross-examination of key government witness, where "[t]he jury was sufficiently apprised of other bases on which [the defendant's] credibility was vulnerable to attack"), *cert. denied*, 444 U.S. 932, 100 S. Ct. 277, 62 L. Ed. 2d 190 (1979); *Elliott*, 571 F.2d at 909 (holding that restrictions placed upon defense counsel's cross-examination did not violate Sixth Amendment violation where "the jury was well aware of the fact that most of the government's witnesses were co-conspirators and convicted felons, testifying under grants of immunity and other agreements with the prosecution").

B

Restivo next contends that the district court's jury instruction regarding the money laundering counts of the indictment, impermissibly altered the indictment. Counts 7, 8, and 9 of the indictment charged Restivo with money laundering. One of the elements of this offense, as charged in the indictment, was that Restivo knowingly entered into financial transactions involving unlawfully-obtained proceeds with the intent to promote the specified unlawful activity of bank fraud charged in Count 2. When instructing the jury on this element, the district court failed to mention bank fraud. Instead, the court instructed the jury that the term "specified unlawful activity" includes "theft, embezzlement or misapplication by a bank officer or employee." Restivo argues that the variance between the instruction and the indictment amounted to a constructive amendment of the indictment

warranting reversal. Because Restivo did not raise this alleged error before the district court, we review the court's instruction for plain error.[13] Plain error is error so obvious and substantial that failure to notice it would affect the fairness, integrity, or public reputation of the judicial proceedings and would result in manifest injustice.[14]

The Fifth Amendment guarantees that a criminal defendant will be tried only on charges presented in a grand jury indictment. "Incident to this constitutional guarantee is the longstanding principle of our criminal justice system that the charges

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[13]*See United States v. Mize*, 756 F.2d 353, 355 (5th Cir. 1985) (reviewing alleged error in jury instruction for plain error where no objection made at trial), *cert. denied*, 484 U.S. 943, 108 S. Ct. 328, 98 L. Ed. 2d 355 (1987); *United States v. Fitzpatrick*, 581 F.2d 1221, 1223 (5th Cir. 1978) (same).

[14]*United States v. Lopez*, 923 F.2d 47, 50 (5th Cir.), *cert. denied*, ___ U.S. ___ 111 S. Ct. 2032, 114 L. Ed. 2d 117 (1991).

contained in an indictment may not be broadened or altered through amendment, except by the grand jury itself."[15] An amendment may be explicit, implicit, or constructive.[16] In deciding whether the district court's jury instruction amounted to a constructive amendment of the indictment, we must determine whether the instruction permitted the jury to convict the defendant on a factual basis that effectively modified an essential element of the offense charged.[17] If so, then reversal is required because the defendant may have been convicted on a ground not

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[15]*United States v. Chandler*, 858 F.2d 254, 256 (5th Cir. 1988) (citing *Stirone v. United States*, 361 U.S. 212, 215-17, 80 S. Ct. 270, 272-73, 4 L. Ed. 2d 252 (1960)).

[16]*Id.*

[17]*See United States v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993); *Mize*, 756 F.2d at 355; *United States v. Young*, 730 F.2d 221, 223 (5th Cir. 1984).

charged in the indictment.[18] If not, then the district court's "refusal to restrict the jury charge to the words of the indictment is merely another of the flaws that mar its perfection but do not prejudice the defendant."[19]

Restivo was charged with, as an essential element of the money laundering counts, conducting financial transactions with the intent to promote the specified unlawful activity of bank fraud. Although the district court instructed the jury that the term "specified unlawful activity" includes theft and embezzlement, we disagree with Restivo's assertion that the inclusion of these terms amounted to a constructive

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[18]*Young*, 730 F.2d at 223; *see Stirone*, 361 U.S. at 213, 80 S. Ct. at 271 ("The crucial question . . . is whether [the defendant] was convicted of an offense not charged in the indictment.").

[19]*Young*, 730 F.2d at 223 (quoting *United States v. Ylda*, 643 F.2d 912, 914 (5th Cir. Unit A 1981)).

amendment of the indictment. The government did not offer and the district court did not permit in evidence, any facts to support these alternative bases of proving the "intent to promote" element of money laundering. Consequently, there is no possibility that the jury was permitted to convict Restivo -- in view of the trial evidence -- on a ground (the intent to promote theft or embezzlement) not charged in the indictment.[20]

The district court's definition of the term "specified unlawful activity" to include misapplication by a bank officer also

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[20]*See United States v. Slovacek*, 867 F.2d 842, 847 (5th Cir.) ("If the court, through its instructions *and facts it permits in evidence*, allows proof of an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment, per se reversal is required." (emphasis added)), *cert. denied*, 490 U.S. 1094, 109 S. Ct. 2441, 104 L. Ed. 2d 997 (1989); *Ylda*, 653 F.2d at 914 (holding that the evidence raised no possibility that the defendant's conviction was based on anything other than the facts set forth in the indictment.)

did not amount to a constructive amendment of the indictment. Again, the money laundering counts of the indictment charged Restivo with conducting financial transactions with the intent to promote the bank fraud described in Count 2 of the indictment. According to Count 2, Restivo accomplished this bank fraud "by means of false and fraudulent pretenses and representations as to the bank's profitability *by continuing to fund the operations of Dixie Lloyd's and related companies*." It is undisputed that Restivo was able to fund Dixie Lloyds's operations through his misapplication of bank funds, which is detailed in Count 5 of the indictment. Because the misapplication by a bank officer was included in the indictment's description of bank fraud, there is no possibility that Restivo was convicted upon a ground (the intent to promote the misapplication by a bank officer) not

charged in the indictment.[21] The district court apparently defined the term "specified unlawful activity" to *only* include theft, embezzlement, or misapplication by a bank officer. We therefore hold that any variance between the indictment and the jury instruction did not amount to a constructive amendment of the indictment, and was at

---

[21]We further note that the government's theory at trial for proving money laundering did not diverge from the indictment -- i.e., that Restivo acted with the intent to promote bank fraud. This is evident from the government's final argument to the jury:

> Count 7 is money laundering. Money laundering. What essentially that boiled down to is basically elements. You got an illegal activity such as misapplication. You got a financial transaction; that is, the movement of money by financial means. In this case it's a credit memo. You got this two hundred thousand dollars which represents Count 7 in the indictment. This money went to pay off this illegal loan. *It promoted the overall bank fraud which the defendant is charged with.*

Record on Appeal vol. 13, at 123-24 (emphasis added).

most, harmless error. Accordingly, we find no plain error in the district court's jury instructions.

C

Lastly, Restivo contends that the evidence was insufficient to support his convictions on Counts 3, 7, 8, and 9 of the indictment. Count 3 charged Restivo with executing and attempting to execute a check-kiting scheme to defraud the Bank, in violation of 18 U.S.C. §§ 1344, 2. Counts 7, 8, and 9 of the indictment charged Restivo with money laundering, in violation of 18 U.S.C. §§ 1955(a)(1)(A)(i), 2.

When deciding the sufficiency of the evidence, we view the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, and ask whether a rational jury could have found the essential elements of the offenses beyond a

reasonable doubt.[22] The evidence need not exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact based upon the evidence could find guilt beyond a reasonable doubt.[23] We further accept all credibility choices which tend to support the jury's verdict.[24]

To convict Restivo of bank fraud, the government had to prove that Restivo knowingly executed a scheme to defraud with the intent to defraud the Bank.[25] A "scheme to defraud" includes any false or fraudulent

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[22]*United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2952, 119 L. Ed. 2d 575 (1992).

[23]*Id.*

[24]*United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991).

[25]*See* 18 U.S.C. § 1334; *United States v. Saks*, 964 F.2d 1514, 1518 (5th Cir. 1992).

pretenses or representations intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived.[26] A defendant acts with the requisite intent to defraud if he acted knowingly and with the specific intent to deceive, ordinarily for the purposes of causing some financial loss to another or bringing about some financial gain to himself.[27]

Although Restivo concedes the existence of the check-kiting scheme, he argues that he did not know of the kite, and therefore did not possess the requisite intent to defraud. Proof of an intent to defraud "may arise by inference from all of the facts and circumstances surrounding a transaction."[28]

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[26]*Saks*, 964 F.2d at 1518.

[27]*Id.*

[28]*United States v. Aubrey*, 878 F.2d 825, 827 (5th Cir.), *cert. denied*, 493 U.S. 922, 110 S. Ct. 289, 107 L. Ed. 2d 269 (1989).

The evidence showed that, although Restivo knew Delchamps was writing checks in excess of $50,000.00 drawn on the Bank and that Delchamps's accounts were constantly overdrawn, Restivo often authorized payment of Delchamps's non-sufficient fund checks. The record also demonstrated that Restivo, when apprised by a subordinate of a possible check-kiting scheme between the Bank and the Bank of Louisiana, directed that subordinate to continue accepting checks from Delchamps which were drawn on the Bank of Louisiana. Based on this evidence, a rational trier of fact could have found beyond a reasonable doubt that Restivo knew of the kite and intended to deceive the Bank. We therefore hold that sufficient evidence supported his conviction on Count 3.

To convict Restivo of money laundering, the government had to prove that Restivo: (1) knowing that the property involved in a financial transaction represented the pro-

ceeds of unlawful activity, (2) conducted or attempted to conduct such a financial transaction which in fact involved the proceeds of specified unlawful activity (3) with the intent to promote the carrying on of specified unlawful activity.[29] Restivo's challenge to the sufficiency of the evidence supporting his convictions on Counts 8 and 9 is derivative of his challenge to the sufficiency of the evidence supporting his conviction on Count 3. Since we reject his challenge to Count 3, we also reject his challenge to Counts 8 and 9.

As for Count 7, Restivo argues that he did not act with the intent to promote the bank fraud described in Count 2. One of the aspects of the bank fraud cited in Count 2 was a knowing scheme "to defraud [the] Bank by hiding the financial condition of Dixie

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[29]18 U.S.C. § 1956(a)(1)(A)(i); *United States v. Alford*, 999 F.2d 818, 823 (5th Cir. 1993).

Lloyd[s] and related companies and their inability to meet their financial obligations to [the] Bank." The evidence showed that Restivo used the proceeds of the unauthorized April 11 loan[30] to repay an earlier loan. Based on this transaction, a rational trier of fact could have found beyond a reasonable doubt that Restivo intended to hide the true financial condition of Dixie Lloyds from the Bank, and thus intended to promote bank fraud. We therefore hold that sufficient evidence supported his conviction on Counts 7, 8, and 9.

III

For the foregoing reasons, we AFFIRM.

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[30]This loan was charged as a misapplication by a bank officer in Count 5.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9585

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDREW W. RESTIVO, II,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion, November, 22, 1993, 5 Cir., , F.3d)

(December 27, 1993)

Before POLITZ, Chief Judge, REAVLEY and E. GARZA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on re-

hearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Emilion M. Garza
United States Circuit Judge

APPENDIX C

DIRECT EXAMINATION BY THE GOVERNMENT OF JERRY DELCHAMPS AS IT PERTAINED TO HIS PLEA BARGAIN

Q. Now, Mr. Delchamps, were you indicted by a federal grand jury on November 1st, 1991?

A. Yes, I was.

Q. What were you indicted for sir?

A. One count of mail fraud and one count of bank fraud.

Q. Was the mail fraud charge in relation to the operation of Dixie Lloyds Insurance Company?

A. Yes, it was.

Q. Now you said bank fraud. Would it be more correct that you were charged with conspiracy to commit bank fraud?

A. Yes, sir.

Q. Was the charge of conspiracy to commit bank fraud in relation to the operation of Dixie Lloyds Insurance Company?

A. Yes, it was.

Q. And would it be fair to say that the count of conspiracy to commit bank fraud, that you committed certain acts in connection with the operation of Dixie Lloyds as it related to the Bank of Louisiana and Schwegmann Bank?

A. Yes, it was.

Q. Okay. Mr. Delchamps, did you conspire to commit bank fraud?

A. Yes, I did.

Q. Mr. Delchamps, in connection with your -- have you pled guilty or not guilty to those charges?

A. I pleaded guilty.

Q. Okay. You pled guilty in this Courthouse, sir?

A. Yes, sir, I did.

Q. Have you been sentenced, yet?

A. No, I haven't.

Q. What Judge is going to sentence you, sir?

A. Judge --

Q. Judge Wicker? Are you familiar with that term, that lady's name?

A. Yes, it is.

Q. Okay. When are you to be sentenced, sir?

A. September the 30th.

Q. Now in connection with your plea of guilty, did you enter into a plea agreement with the Government?

A. Yes, I did.

Q. At the time you entered into a plea agreement with the Government, were you represented by an attorney?

A. Yes, I was.

Q. What was your understanding of that agreement, sir?

A. The agreement that I signed was that the Government, not the Government, but the prosecutors of the Government would ask me to tell the truth and everything I know about this case and about the insurance and operation of Dixie Lloyds and, by doing so,

they would write a letter for me, if I tell the truth exactly what happened, to the Judge and ask for a lighter sentence.

Q. Now, Mr. Delchamps, in connection with your plea agreement with the Government, did you execute a plea agreement with my office?

A. Yes, I did.

Q. Okay. I'll show you what I've marked as Government Exhibit 7 and ask you, sir, have you seen this document before?

(Counsel shows exhibit to the witness.)

A. Yes, I have.

Q. What is that document, sir?

A. This is the plea agreement with the United States Government and myself.

Q. Did you sight that agreement?

A. Yes, I did.

MR. PERRICONE: In connection with the witness' testimony, Your Honor, the Government would move Exhibit 7, the plea agreement, into evidence.

MR. O'CONNOR: No objection.

THE COURT: All right. Let it be admitted.

BY MR. PERRICONE:

Q. Mr. Delchamps, did the Government promise you anything?

A. No, they didn't.

Q. Did I promise you anything?

A. No, you didn't.

Q. What could violate that agreement that's Exhibit 7?

A. If I would lie and wouldn't tell the truth.

Q. Okay. Do you have any other agreements with the Government at this time, sir?

A. No, sir, I don't.

APPENDIX D

CROSS-EXAMINATION OF JERRY DELCHAMPS AS IT PERTAINED TO HIS PLEA BARGAIN

BY MR. O'CONNOR:

Q. Now, you went over the indictment to which you pled guilty and you pled guilty to two counts?

A. That's right.

Q. Okay. Neither one of those counts dealth with money laundering?

A. No, sir.

Q. Was it suggested to you that you could have been charged with a money laundering count similar to the one by which Mr. Restivo is indicted?

A. I do not know what Mr. Restivo was indicted on.

Q. Were you told that you could have been indicted and that but for your plea agreement it would have happened, do you recall those discussions?

A. Yes, I could have been indicted for money laundering.

Q. So as far as your plea agreement, you got a cap on the maximum amount of sentence that you could possibly receive in any set of circumstances?

MR. PERRICONE: Your Honor, the government would object to any testimony relative to sentence. It's not proper questioning, it's not proper topic for the jury, and Mr. O'Connor knows that.

MR. O'CONNOR: Your Honor, I was simply establishing a cap, not anything that could be discretionary.

MR. PERRICONE: Your Honor, in fact --

THE COURT: There is no cap.

MR. PERRICONE: You said it for me, Your Honor.

THE COURT: The objection is sustained.

BY MR. O'CONNOR:

Q. Do you understand that an important part of the determination of your sentence

will depend on whether or not you get a 5K letter setting forth the amount of your cooperation as perceived by the United states Attorney's Office?

A. Yes, sir.

Q. Okay. And where that doesn't equate out to any numerical function of time and may in fact be disregarded by the sentencing judge, it's a very important factor to you?

A. Yes, sir.

Q. And the only way you can get that 5K letter is if Mr. Perricone and the office of the United States Attorney think you've earned it?

A. Or if I tell the truth, which I'm doing.

Q. But they have to agree that what you say is the truth in order for them to write that letter. They're not obligated to give you that letter?

MR. PERRICONE: I object. That's not part of the agreement. Exhibit 7's in

evidence. If Mr. O'Connor wants to cross-examine the witness from Exhibit 7, which is the plea agreement, we have no objection to that. I think he's misstating the agreement.

THE WITNESS: They also said it's up to the Judge to sentence me.

MR. O'CONNOR: Right. I'm going by what his understanding is and he said he knew what a 5K was and that it's important.

THE COURT: Well, he signed a plea agreement.

MR. PERRICONE: That's his understanding.

MR. O'CONNOR: Well, he might have an understanding aside from what's in the plea agreement.

THE COURT: I doubt it.

MR. O'CONNOR: Well, I'm just saying he testified about the 5K and that it was important and that's all I was trying to --

THE COURT: Is your understanding of the plea agreement what was represented by the document that you signed?

THE WITNESS: Yes, ma'am.

THE COURT: And that document is in evidence. The jury can review it.

BY MR. O'CONNOR:

Q. Now, your daughter was also an owner of the company, was she not?

A. That's right.

Q. And she's a college graduate, is she not?

A. Yes.

Q. And she worked very frequently and very often in the affairs of Dixie Lloyds?

A. Yes.

Q. And so did her husband Steve Bossier?

A. Yes.

Q. And they signed many, many, many of these checks that are in evidence?

A. I don't know if Steve signed many of them, I know Barbara did.

Q. Okay. Steve accompanied you on many of your trips to see regulators and others?

A. No.

Q. Didn't he go with you to see the Attorney General?

A. Steve and my daughter did, yes.

Q. Okay. And they made other trips on company business with you to explain the affairs of the company?

A. My daughter did, my son-in-law didn't.

Q. Didn't you credit your son-in-law with the mistake in overpaying claims that caused the cash flow problem?

A. Repeat this again now?

Q. In at least one occasion didn't you attribute the problem the company was having with the fact that you paid out too much money in claims at one time?

A. That's right.

Q. And he was in charge of making those decisions, it was his decision that caused you the big problem --

A. It was --

Q. -- you said.

A. -- his and one or two other people. It was his, my daughter's and Myrna Irman's (phonetic).

Q. And all through the check kite, they worked with the company and signed checks and answered the phone?

A. That's right.

Q. And it was not part of the deal that you described or is it in your plea agreement, but --

MR. PERRICONE: Your Honor, I'm going to object. Again, Exhibit 7 is the controlling document regarding Mr. Delchamps' agreement with the government. Mr. O'Connor knows this.

MR. O'CONNOR: No, I'm just exploring what the facts are, Your Honor, that none of these other people have been charged.

THE COURT: I don't see the relevance.

BY MR. O'CONNOR:

Q. Isn't it a fact that you paid for the Bossiers' house in Mississippi out of one of the acounts, their monthly notes?

MR. PERRICONE: Your Honor, I'm going to object to the relevance.

THE COURT: What's the relevance, Mr. O'Connor?

MR. O'CONNOR: That he, by his agreed testimony, has benefited himself and those for whom he cares to a much greater degree, not by contract, but for whatever reason have come out with a very nice total package.

MR. PERRICONE: Your Honor, may we approach the bench?

THE COURT: Yeah.

MR. PERRICONE: Mr. O'Connor's going to testify, let's put him under oath.

(Bench conference.)

THE COURT: I don't see the relevance to paying off the loan.

MR. O'CONNOR: To show that they had an interest and participated, that they did as much as anybody did. They're not charged. They're not named as targets or subjects.

THE COURT: And they're not on trial.

MR. PERRICONE: They're not on trial.

MR. O'CONNOR: And my suggestion or the inference for the jury to draw is that by his cooperation Mr. Delchamps has caused the government to choose, not by contract, but just to ignore them.

MS. HARRIS: Judge, there's a jury instruction that says that they cannot deliberate on the guilt or innocence of any other party. Secondly, they're asking him to draw an improper inference because the plea agreement is the only agreement there is and it states it on its face. So what you're trying to do is get an inference of unfairness on the government which is not a jury issue. That unfairness being that we're picking and choosing who to charge.

MR. O'CONNOR: No, the inference is that he has an incentive, that he has an interest in telling the truth as you all see it, of pleasing you with his testimony because it will benefit him and those near him. That it's a biased --

MR. PERRICONE: That's not in the agreement, Your Honor.

THE COURT: You haven't proven bias.

MR. PERRICONE: That's not in the agreement.

MR. O'CONNOR: I don't think I'd have to prove it's in the agreement in the four corners if he has benefited from it.

THE COURT: The government doesn't have to approve his testimony. It only has to be truthful.

MR. O'CONNOR: But who reports to the court whether they believe it was truthful or not? Who is Judge Wicker going to look to as to whether the testimony was truthful or not?

THE COURT: She could very likely look to the jury verdict and to me.

MR. O'CONNOR: She could but she should also look to a 5K letter.

MS. HARRIS: And very likely call up this judge.

MR. O'CONNOR: I mean all of those are possible. I was simply saying he has an interest to help some people around him.

MR. PERRICONE: It is not in the plea agreement. Show me the plea agreement where it says I will not charge his daughter or son-in-law. Show me where it says that.

MR. O'CONNOR: I'm just going beyond it saying that there were understandings or hopes. He hopes --

MR. PERRICONE: You're going beyond --

MR. O'CONNOR: -- that they'll take --

MR. PERRICONE: You're going beyond the scope of direct examination.

THE COURT: You really have.

MR. PERRICONE: I'm enjoying his testimony and that's why I have not been objecting but every twenty minutes.

THE COURT: But he did say it for the fifteenth time that it was not.

MR. PERRICONE: You want to go for sixteen?

MR. O'CONNOR: Okay. I'll get off of it.

THE COURT: Stay off this.

(End of bench conference.)

APPENDIX E

October 3, 1991

Honorable Veronica Wicker
United States District Judge
Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

Re: United States v. Jerry D. Delchamps
Criminal Docket No. 91-527 "L" (2)

Dear Judge Wicker:

In compliance with the holding of Bryan v. United States, 492 F.2d 775 (5th Cir. 1974), and with Rule 11 of the Federal Rules of Criminal Procedure, the United States of America wishes to acknowledge the following agreement between the Government and the defendant, in the above captioned proceeding. Defendant's undersigned counsel has reviewed the terms of this agreement; has explained the terms of this agreement to defendant; and has ensured that defendant fully understands the terms of this agreement. Mr. John Messina has been advised by

the defendant that the defendant fully understands the terms of this agreement.

The defendant has agreed to tender to the Court a plea of guilty to one count of conspiracy to commit bank fraud (Title 18, United States Code, Section 1344, 371) and one count of mail fraud (Title 18, United States Code, Section 1341).

The defendant understands that the maximum possible penalty for the offense of conspiracy to commit bank fraud is five years imprisonment and a $10,000 fine or both, or in the alternative to the fine stated earlier, a fine of $250,000 or the greater of twice the gross gain to the defendant or twice the gross loss to any person under Title 18, United States Code, Section 3571. It is also understood that the Court may order restitution to any victim in this case under the provisions of Title 18, United States Code, Section 3663, if the Court finds it appropriate to do so.

Further, the defendant understands that a mandatory special assessment of $50.00 shall be imposed under the provisions of Title 18, United States Code, Section 3013. Further, the defendant understands that the Court, in imposing the sentence for term of imprisonment, may include as part of the sentence, a requirement that the defendant be placed on a term of supervised release after imprisonment for a period up to three years, pursuant to Title 18, United States Code, Section 3583.

The defendant further understands that the maximum possible penalty for the offense of mail fraud is five years imprisonment and a $1,000 fine or both, or in the alternative to the fine stated earlier, a fine of $250,000 or the greater of twice the gross to the defendant or twice the gross loss to any person under Title 18, United States Code, Section 3571. It is also understood that the Court may order restitution to any

victim in this case under the provisions of Title 18, United States Code, Section 3663, if the Court finds it appropriate to do so. Further, the defendant understands that a mandatory special assessment fee of $50.00 shall be imposed under the provisions of Title 18, United States Code, Section 3013. In addition, the defendant further understands that the Court, in imposing the sentence of a term of imprisonment, may include as part of that sentence a requirement the defendant be placed on a term of supervised release after imprisonment for a period of up to three years, pursuant to Title 18, United States Code, Section 3583. Supervised release is a period of time following release from prison during which the defendant's conduct will be monitored by the Court or the Court's designee. The defendant fully understands that if the defendant violates any of the conditions of the supervised release that the Court has

imposed, the defendant's supervised release may be revoked and defendant may be ordered by the Court to serve in prison all or part of the term of the supervised release.

The defendant understands that any discussions with the defendant's attorney or anyone else regarding the sentencing guidelines are merely rough estimates and the Court is not bound by those discussions. The defendant additionally understands that the Court could impose a maximum term of imprisonment and fine allowed by law, including improvision of supervised release.

This plea agreement is predicated upon the fact that the defendant agrees to submit to interviews whenever and wherever requested by law enforcement authorities. The defendant understands that he must be completely truthful. The defendant also agrees to appear before the Grand Jury or Trial Jury and to testify truthfully. The defendant agrees that if he is not truthful, this

agreement will be null and void and the defendant may be prosecuted for perjury or making false statements. The defendant agrees neither to implicate anyone falsely nor to exculpate or protect anyone falsely. The defendant further agrees to immediately advise the Government as to any person the defendant believes to be violating the law and the defendant agrees to assist the Government with regard to the investigation and prosecution of the criminal conduct.

The Government agrees to bring to the attention of the Court any cooperation rendered by the defendant prior to sentencing. The United States may, but shall not be required to make a motion requesting the Court to depart from the sentencing guidelines in the event the defendant provides "substantial assistance". It shall be the sole discretion of the United States Attorney as to whether a motion requesting depar-

ture from the sentencing guidelines should be filed.

The Government also agrees that any statements or testimony given by the defendant pursuant to questions asked by federal agents or prosecutors as a result of this agreement will not be used against the defendant nor will anything derived from the statements or testimony be used against the defendant except for the purpose of impeachment. However, all parties understand that any statements or testimony given by the defendant shall be used as leads or for any other reasons against other persons. Further, the defendant fully understands that should he commit perjury or give false statements to federal agents, the statements and testimony can be used to prove those offenses, and he faces additional criminal charges.

The defendant agrees to disclose his ownership of all assets involved in or

obtained through violations of financial institution fraud. The defendant agrees not to contest forfeiture of assets deemed to have been involved in financial institution fraud. Assets include but are not limited to cash, negotiable instruments, securities or real property, as well as any interest in any asset or money the defendant received or could receive from defendant's illegal activities.

The defendant understands that the statements set forth above represent the defendant's entire agreement with the Government; there are not any other agreements, letters or notations that will affect this agreement.

Very truly yours,

HARRY ROSENBERG
UNITED STATES ATTORNEY

/s/
SALVADOR R. PERRICONE
Assistant United States Attorney

(3)

Supreme Court, U.S.
FILED
JUN 15 1994
OFFICE OF THE CLERK

No. 93-1630

In the Supreme Court of the United States

OCTOBER TERM, 1993

ANDREW V. RESTIVO, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530
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16pp

QUESTION PRESENTED

Whether the limitations placed on petitioner's cross-examination of a government witness violated the Confrontation Clause.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 8 F.3d 274.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1993. A petition for rehearing was denied on December 27, 1993. Pet. App. 23-24. The petition for a writ of certiorari was filed on March 28, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of conspiracy to misapply bank funds and to make false entries in bank documents, in violation of 18 U.S.C. 371; bank fraud, in violation of 18 U.S.C. 1344; misapplication of bank funds, in violation of 18 U.S.C. 656; money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); making false entries in bank documents, in violation of 18 U.S.C. 1005; and making false statements before a grand jury, in violation of 18 U.S.C. 1623(a). He was sentenced to 100 months' imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. Pet. App. 1-22.

1. Petitioner was the president of Schwegmann Bank. One of the bank's customers was Jerry Delchamps, the president of Dixie Lloyds Insurance Company. In February 1990, Delchamps' accounts with the bank were overdrawn by $345,000. With petitioner's knowledge, but without the knowledge or approval of the bank's board of directors (the board),[1] Delchamps obtained a $500,000 loan by executing a promissory note in that amount to the bank. Pet. App. 2-3; Gov't C.A. Br. 4-10.

By April 1990, Delchamps' accounts with Schwegmann Bank were again overdrawn. On April 11, Delchamps executed another $500,000 promissory note to the bank, again without the knowledge of the board. Petitioner initialed the note so that the

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[1] Any loan over $250,000 required the board's approval. Gov't C.A. Br. 8 n.2.

proceeds could be disbursed, and he used a portion of the proceeds to pay off the outstanding balance on the February loan to Delchamps. Two days later, Delchamps executed another promissory note to the bank in the amount of $485,328.96, which petitioner also initialed. Again, the board had no knowledge of the unauthorized loan. Pet. App. 4, 22; Gov't C.A. Br. 10-12, 49.

In 1990, Delchamps engaged in a check-kiting scheme involving Schwegmann Bank and the Bank of Louisiana, where he also maintained checking accounts. Delchamps deposited checks drawn on each bank in the other bank to make it appear that there were substantial deposits in his accounts at both banks. Although petitioner knew that Delchamps was writing checks for more than $50,000 drawn on Schwegmann Bank and that Delchamps' accounts at the bank were constantly overdrawn, petitioner often authorized payment of Delchamps' non-sufficient funds checks. When a bank officer told petitioner that he suspected that Delchamps was involved in a check-kiting scheme between Schwegmann Bank and the Bank of Louisiana, petitioner directed the officer to continue accepting checks drawn on the Bank of Louisiana from Delchamps. Pet. App. 5 n.5, 20; Gov't C.A. Br. 12-13, 41-46.

2. Before trial, Delchamps entered into a plea agreement with the United States, under which he agreed to cooperate with the government and to plead guilty to mail fraud and conspiracy to commit bank fraud. Pet. App. 43, 46-47. The agreement stated that Delchamps understood that the "maximum possible penalty" for each of those offenses was five years' imprisonment, and that the sentencing court could

impose the maximum penalty. *Id.* at 43-46. The agreement also stated that "[t]he United States may, but shall not be required to" file a motion requesting the sentencing court to depart downward from the Sentencing Guidelines "in the event the defendant provides 'substantial assistance,'" but that "[i]t shall be the sole discretion of the United States Attorney as to whether a motion requesting departure * * * should be filed."[2] *Id.* at 47-48. Finally, the agreement stated that it was Delchamps' "entire agreement" with the government and that "there are not any other agreements, letters or notations that will affect this agreement." *Id.* at 49.

At petitioner's trial, Delchamps testified on direct examination that he had pleaded guilty to mail fraud and conspiracy to commit bank fraud pursuant to an agreement with the government and that he was awaiting sentencing. Pet. App. 25-27. The prosecutor introduced Delchamps' plea agreement into evidence, and Delchamps testified that his understanding of the agreement was that if he testified truthfully, the government would request that the sentencing court impose a "lighter sentence." *Id.* 27-28. Delchamps testified, however, that the government had not promised him anything, and that he had no other agreements with the government. *Id.* at 29.

On cross-examination, Delchamps acknowledged that he could have been, but was not, charged with

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[2] Sentencing Guidelines § 5K1.1 authorizes a court to impose a sentence below the Guidelines sentencing range "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."

money laundering. Pet. App. 30-31. Petitioner's counsel then asked Delchamps:

> So as far as your plea agreement, you got a cap on the maximum amount of sentence that you could possibly receive in any set of circumstances?

Id. at 31. The prosecutor objected to "any testimony relative to sentence." *Ibid.* Petitioner's counsel explained, "Your Honor, I was simply establishing a cap, not anything that could be discretionary." *Ibid.* The district court sustained the objection, stating that "[t]here is no cap." *Ibid.*

Petitioner's counsel then turned to the subject of the potential government motion under Guidelines § 5K1.1 requesting that the court impose a lower sentence based on Delchamps' cooperation. After establishing that Delchamps understood that "an important part of the determination" of his sentence would depend on whether the government filed a motion "setting forth the amount of your cooperation as perceived by the United [S]tates Attorney's Office," and that this was a "very important factor" to Delchamps, petitioner's counsel asked:

> And the only way you can get that 5K letter is if [the prosecutor] and the office of the United States Attorney think you've earned it?

Pet. App. 31-32. Delchamps responded, "Or if I tell the truth, which I'm doing." *Id.* at 32. Petitioner's counsel then asked:

> But they have to agree that what you say is the truth in order for them to write that letter. They're not obligated to give you that letter?

Ibid. The prosecutor objected on the ground that petitioner's counsel was "misstating" the plea agreement. *Id.* at 32-33. Petitioner's counsel explained that Delchamps "might have an understanding aside from * * * the plea agreement." *Id.* at 33. The court asked Delchamps whether his understanding of the plea agreement was "what was represented by the document that you signed," and Delchamps responded affirmatively. *Id.* at 34. The court then stated, "And that document is in evidence. The jury can review it." *Ibid.*

Finally, petitioner's counsel asked Delchamps a series of questions about the involvement of his daughter and son-in-law in Delchamps' insurance company. After eliciting that Delchamps' daughter was an owner of the insurance company, that she and her husband worked for the company, and that she had signed many of the checks that were introduced into evidence at petitioner's trial, petitioner's counsel asked:

> And it was not part of the deal that you described or is it in your plea agreement, but—

Pet. App. 34-36. The prosecutor objected, and petitioner's counsel explained that he was "just exploring what the facts are, Your Honor, that none of these other people have been charged." *Id.* at 36. Petitioner's counsel then asked whether Delchamps had purchased a house for his daughter and son-in-law "out of one of the accounts, their monthly notes." *Id.* at 37. The prosecutor objected on grounds of relevance. *Ibid.* At a bench conference, petitioner's counsel stated that Delchamps' daughter and son-in-law "did as much as anybody did" in connection with

Delchamps' company, but were "not charged" and "not named as targets or subjects." *Id.* at 38. The defense attorney explained that he was attempting to show that Delchamps had an incentive to testify favorably for the government "because it will benefit him and those near him." *Id.* at 39. The prosecutor responded that "[t]hat's not in the agreement, Your Honor." *Ibid.* The court concluded that petitioner's counsel had not "proven bias," and directed the attorney to "[s]tay off" that line of questioning. *Id.* at 39-41.

3. The court of appeals rejected petitioner's contention that the curtailment of his cross-examination of Delchamps violated the Confrontation Clause. The court explained that "[t]he Confrontation Clause of the Sixth Amendment is satisfied where defense counsel has been 'permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.' " Pet. App. 7-8 (quoting *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974)). In this case, the court noted, petitioner's counsel "was permitted to expose to the jury the following: that Delchamps entered into a plea agreement with the government; that Delchamps could have been charged with the more serious offense of money laundering if not for his plea agreement; and that the issuance of the § 5K1.1 letter for sentencing purposes was within the discretion of the government." Pet. App. 8. The court concluded that "[b]ased upon these facts, the jury could have inferred that Delchamps was a biased witness." *Id.* at 8-9. Accordingly, the court held that the district court's restrictions on

petitioner's cross-examination of Delchamps did not violate the Sixth Amendment. *Id.* at 9.

ARGUMENT

Petitioner renews his contention (Pet. 17-52) that the district court violated the Confrontation Clause by restricting his cross-examination of Delchamps. The court of appeals properly rejected that claim, and its fact-bound holding does not merit this Court's review.

In *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), the Court held that a defendant's confrontation rights are violated when he is denied all cross-examination regarding a subject that "a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Id.* at 679. The Court made clear, however, that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concern about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid.* See also *Michigan* v. *Lucas*, 500 U.S. 145, 149 (1991); *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974).

In this case, the district court was well within its discretion in limiting cross-examination that might have misled or confused the jurors. Petitioner's attorney asked whether Delchamps "got a cap on the maximum amount of sentence that you could possibly receive in any set of circumstances" (Pet. App. 31), but that question misleadingly implied that the government and Delchamps had agreed to an upper limit on Delchamps' sentence other than the five-year

statutory maximum term for each offense that was set forth in the plea agreement. Similarly, while the attorney suggested to Delchamps that "[the government has] to agree that what you say is the truth" (*id.* at 32) to file a motion requesting a downward departure from the Guidelines, the plea agreement actually provided only that the government had "sole discretion" (*id.* at 47) in determining whether to move for a downward departure. Finally, the defense counsel's suggestion that Delchamps and the government had reached an unwritten agreement that the government would refrain from charging Delchamps' daughter and son-in-law for their involvement with Delchamps' insurance company was directly contradicted by the plea agreement, which specifies that it is "the defendant's entire agreement with the Government; there are not any other agreements, letters or notations that will affect this agreement." Pet. App. 49. Defense counsel offered no foundation for his contrary speculation.

As the court of appeals recognized, Pet. App. 7-8, the Confrontation Clause is not violated by the curtailment of cross-examination when the jury receives sufficient information to make a discriminating appraisal of the witness's motives for testifying for the government.[3] In this case, the prosecutor elicited

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[3] See *United States* v. *Taylor*, 17 F.3d 333, 340-341 (11th Cir. 1994) (finding no confrontation violation in denial of a line of cross-examination when "the jury possessed extensive information from which to gauge [the witness's] credibility"); *United States* v. *Caming*, 968 F.2d 232, 237 (2d Cir.) (despite denial of cross-examination on two points, district court did not improperly curtail cross-examination where "the jury still was in possession of facts sufficient to make a discriminating

from Delchamps that he had pleaded guilty to fraud charges pursuant to an agreement with the government and that he had not yet been sentenced. The prosecutor also introduced into evidence Delchamps' plea agreement, which stated that the government had discretion to file a motion requesting that Delchamps receive a lower sentence based on his cooperation. On cross-examination, Delchamps testified that he could have been, but was not, charged with money laundering,[4] that he understood that an "important part" (*id.* at 31) of the determination of his sentence would depend on whether the government filed a motion requesting a lower sentence, and that the government's decision whether to file the motion was a "very important factor" to him. *Id.* at 32. These facts gave the jury an ample basis for assessing Delchamps' motives for testifying, his credibility, and the possibility that he was biased in favor of the government.[5]

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appraisal of [the witness's] credibility") (internal quotation marks omitted), cert. denied, 113 S. Ct. 416 (1992); *United States* v. *Klauer*, 856 F.2d 1147, 1149 (8th Cir. 1988) (no confrontation violation in denial of cross-examination about specifics of sentencing concessions witness received when the defendant had "more than ample opportunity to cross-examine [the witness] as to his bias, motive and overall unreliability as a witness").

[4] Although petitioner complains (Pet. 12-13) that the jury "never learned" that money laundering carries a maximum 20-year sentence, he never sought to elicit that information from Delchamps.

[5] Contrary to petitioner's assertion (Pet. 42), the court of appeals did not "engage[] in a kind of outcome-determinative analysis" that this Court rejected in *Van Arsdall*. Rather than requiring the defendant to show that "the particular limitation

2. Petitioner contends (Pet. 17-36) that the court of appeals' decision in this case conflicts with other decisions in which courts have found that restrictions on a defendant's cross-examination of a witness violated the Confrontation Clause. The cases on which petitioner relies, however, merely applied the legal standard set forth in *Davis* v. *Alaska* and *Delaware* v. *Van Arsdall* to the facts in those cases, as the court of appeals did here. See Pet. App. 7-8 (citing *Davis* and *Van Arsdall*). The different determinations made on different factual records in the cases petitioner cites does not present a conflict warranting this Court's review.

In any event, the cases on which petitioner relies do not support his claim. In *United States* v. *Lankford*, 955 F.2d 1545 (11th Cir. 1992), the court held that the district court violated the defendant's Confrontation Clause rights by preventing him from questioning the government's chief witness regarding state authorities' arrest of the witness's sons for selling marijuana. *Id.* at 1548-1549. The court explained that the witness's decision to cooperate with the government might have been motivated by a desire to prevent a federal investigation into his sons' marijuana trafficking or to solicit help from federal authorities

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on cross-examination created a reasonable possibility that the jury returned an inaccurate guilty verdict," 475 U.S. at 679-680, the court of appeals properly focused on "the particular witness, not on the outcome of the entire trial." *Id.* at 680. The court summarized the facts relating to Delchamps' bias that were placed before the jury during his direct examination and cross-examination and held that "[b]ased upon these facts, the jury could have inferred that Delchamps was a biased witness." Pet. App. 8-9.

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in his sons' state case. *Id.* at 1549. Moreover, the court noted, the witness's "cooperation with the government appears to have begun about the time when [the witness] was admittedly worried about his sons and the charges they were facing." *Id.* at 1549 n.8. In this case, however, the evidence of a connection between the potential criminal liability of the witness's relatives and his decision to cooperate with the government was much weaker than in *Lankford.* Delchamps' daughter and son-in-law had not been arrested, and there was no showing that they could have been charged with any offense. As the defense attorney acknowledged, the daughter and son-in-law were not even "named as targets or subjects" (Pet. App. 38) of the investigation. The suggestion that the government might have agreed not to charge Delchamps' daughter and son-in-law in exchange for his cooperation was wholly speculative.

United States v. *Roan Eagle*, 867 F.2d 436 (8th Cir.), cert. denied, 490 U.S. 1028 (1989), is also unhelpful to petitioner. In that case, the court found a confrontation violation where the district court disallowed cross-examination of a government witness concerning the details of her plea agreement with the government, including the offense to which she pleaded guilty and the maximum sentence she could receive. *Id.* at 442-443. Here, in contrast, the government introduced into evidence Delchamps' plea agreement, which stated the offenses to which Delchamps was entering guilty pleas and the maximum punishment he could receive for each offense, and petitioner's counsel cross-examined Delchamps about the terms of the agreement. Similarly, in *United States* v. *Mayans*, 17 F.3d 1174 (9th Cir. 1994),

the court of appeals held that the district court erred in refusing to allow cross-examination of government witnesses concerning their understanding of specific provisions of their plea agreements. *Id.* at 1184-1185. In this case, however, Delchamps testified on both direct examination and cross-examination concerning his understanding of the plea agreement.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] *United States* v. *Lynn*, 856 F.2d 430 (1st Cir. 1988), on which petitioner also relies (Pet. 34 n.18), is completely inapposite. In that case, the court held that the defendant's rights under the Confrontation Clause were violated when the district court allowed a government witness to testify that his plea agreement required him to "pass a polygraph test," but refused to permit the defense counsel to make any inquiry into the results of the polygraph examination, including the fact that some of the witness's answers were deemed "inconclusive" by the examiner. 856 F.2d at 432-434. No such evidence was present in this case.